Filed 9/21/09 In re T.B. CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re T.B., a Person Coming Under the Juvenile Court Law.	
ORANGE COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. TIMOTHY B., Defendant and Appellant.	G041623 (Super. Ct. No. DP006937) O P I N I O N

Appeal from an order of the Superior Court of Orange County, Douglas Hatchimonji, Judge. Affirmed.

Roni Keller, under appointment by the Court of Appeal, for Defendant and Appellant.

Nicholas S. Chrisos, County Counsel, and Karen L. Christensen, Deputy County Counsel, for Plaintiff and Respondent.

No appearance for Minor.

* * *

INTRODUCTION

Timothy B. (Father) pleaded nolo contendere to a juvenile dependency petition filed by the Orange County Social Services Agency (SSA) on behalf of, inter alia, then 11-year-old T.B., under Welfare and Institutions Code section 300, subdivisions (b) (failure to protect) and (j) (abuse of sibling). (All further statutory references are to the Welfare and Institutions Code.) The juvenile court sustained the petition, terminated Father's reunification services, and, in light of T.B.'s Down syndrome and related health issues, selected long-term foster care as T.B.'s permanent plan. At the January 2008 postpermanency plan review hearing held pursuant to section 366.3, the juvenile court denied Father's request to hold a contested hearing, found the services provided to T.B. had been adequate, and set the matter for a further postpermanency plan review hearing. Father argues the juvenile court erred by denying his request for a contested postpermanency plan review hearing and by finding that adequate services had been provided to T.B.

We affirm. Under section 366.3, subdivision (f), Father was not entitled to a contested postpermanency plan review hearing unless he made an offer of proof showing that removing T.B. from his current placement and returning him to Father's care would serve T.B.'s best interest. Father did not make such an offer of proof. Furthermore, substantial evidence supported the juvenile court's finding T.B. had received adequate services.

BACKGROUND[1]

In August 2002, Father pleaded nolo contendere to the allegations of the amended juvenile dependency petition which alleged T.B. and his sister, R.B., came within the jurisdiction of the juvenile court under section 300, subdivisions (b) (failure to

[1] Because T.B.'s mother is not a party to this appeal, we refer to her only as relevant to the issues presented in this appeal.

protect) and (j) (abuse of sibling). The amended petition also alleged R.B. came within the court's jurisdiction under section 300, subdivision (a) (serious physical harm).

The amended petition alleged T.B. and R.B. resided with Father; their mother and Father were divorced and did not live together. On June 23, 2002, then nine-year-old T.B. and then 13-year-old R.B. were detained after Father hit R.B., causing her to suffer a broken nose, and failed to obtain medical care for her. Father had previously disciplined R.B. by striking her with a paddle.

The amended petition further alleged R.B. had been previously taken into protective custody in December 1988 "due to substantiated allegations of sexual abuse, neglect and emotional abuse of [her] half-sibling, J[.]W[.]" by Father. R.B. "was determined to be at risk" and was declared a dependent of the juvenile court. She had a permanent plan until June 1994, when her dependency status was terminated.

The juvenile court found the allegations of the amended petition true by a preponderance of the evidence and declared T.B. and R.B. dependent children of the court. R.B.'s dependency case was closed in November 2006 after she had reached the age of majority. No issues regarding R.B's dependency case are raised in this appeal.

In February 2004, the juvenile court terminated reunification services and selected a permanent plan of long-term foster care for T.B. In March 2005, the court found, "the permanent plan of independent living with identification of a caring adult to serve as a lifelong connection" for T.B. was appropriate and ordered as the permanent plan.

SSA filed a status review report, dated September 8, 2008, stating that then 15-year-old T.B. resided at a South Coast Children's Society group home, "a Level 14 Regional Center Group Home," where he was being provided the structured setting and "1:1 status" he required. The status review report chronicled T.B.'s medical care, specialized developmental and educational services, and mental and emotional status. The report stated Father communicated with T.B. through telephone calls and periodic

visits, and further stated Father wished to care for T.B. at his home in Idaho where he lived with his new wife. At the juvenile court's request, SSA researched whether T.B. might be transferred to a group home setting in Idaho, but did not find a group home that could or would accept T.B.

SSA also reported incidents where T.B. "ha[d] acted out scenes of 'Daddy hitting mommy[.']" T.B. took Father's picture and wanted to shred it in a shredding machine. SSA recommended that T.B. continue as a dependent child of the juvenile court, that the court find T.B.'s current placement is appropriate, and that the court conclude T.B. should continue placed in long-term foster care.

The juvenile court scheduled a postpermanency plan review hearing under section 366.3 for September 8, 2008. On September 8, however, Father's counsel declared a conflict and new counsel was appointed for Father. The court continued the hearing.

SSA filed an addendum report dated October 30, 2008. That report stated the house manager at T.B.'s group home reported that Father engaged in some "'questionable behavior'" during his September 8 monitored visit with T.B. by "plac[ing] his hand on T[.B.]'s 'butt.'" The social worker reviewed a special incident report stating that on September 9, T.B. got out of bed, pushed a stuffed bear up against a wall, and called it a """bad boy."""" T.B. also held the bear with one arm at the neck and shook a finger at it. He then threw the bear on the floor. The incident report stated that T.B. "'was processed . . . about nice touches and proceeded to give the bear a hug and scratched the bear[']s butt before patting it.'" The house manager also stated T.B. "ha[d] been physically acting out some aggression in scenarios involving 'daddy hitting mamma,'" which behavior was "'new for T[.B.].'" She also said that T.B.'s aggression had escalated after his visit with Father and that T.B. had acted out sexually toward the staff, other residents, and his stuffed bear.

R.B. told the social worker that she thought T.B. was referring to Father's abuse of her when he used the term "'mamma.'" T.B. often referred to R.B. as "'mama.'" The October 30, 2008 addendum further report stated, "T[.B.] continues to function well in the care of the staff at the South Coast Children's Society home. T[.B.] appears to be happy and all of his physical, emotional, medical, and educational needs are being met in his current placement. The staff reports that T[.B.] is well liked and well received by the staff and other residents. The undersigned believes the best and most appropriate plan for T[.B.] continues to be Long Term Foster Care."

On October 30, 2008, the juvenile court rescheduled the postpermanency plan review hearing for January 8, 2009. The hearing took place on January 8, at which time the court admitted into evidence SSA's September 8 and October 30, 2008 reports as well as an addendum report, dated January 8, 2009, which provided further information on T.B.'s medical condition and behavioral issues.

At the postpermanency plan review hearing on January 8, 2009, the juvenile court stated it had received a letter from Father, who was not present at the hearing. Father's letter, dated December 17, 2008, was addressed to the Governor, the Attorney General's Office, the Commission on Judicial Performance, the Juvenile Justice Commission, the "Supervising Judge," one of the assigned juvenile court judges, and his own attorney. In his letter, Father expressed his general frustration and disappointment with the handling of T.B.'s dependency case and how Father's rights had been repeatedly violated. He expressed frustration with his appointed counsel. He complained about not hearing from his counsel, not receiving copies of court reports, and being deprived by his counsel of the opportunity to call witnesses to show inaccuracies in such reports. He ended the letter by asking, "what has gone forward that I am unaware of or not allowed to dispute?"

The court asked Father's appointed counsel whether he wanted to be heard as to the letter and the following discussion occurred.

"[Father's counsel]: Yes, Your Honor.

"I haven't had any contact with my client since he sent all parties or people addressed this letter. He has not called me. And I have mailed to him documents so that he could look through the discovery and see if there were any issues he could spot which would warrant a hearing.

"I've not heard back from him, and those records were sent approximately two weeks ago to him after I reviewed them. I know that in one of the reports he was very concerned that the information the social worker provided cast him and his wife in a negative light regarding domestic violence. It's unclear from that report what the social worker is trying to imply in regards to his son's acting-out behavior.

"The father and I would like to cross-examine the social worker regarding that information to clarify what instance she might be referring to. I think I would need probably less than an hour to have a contested hearing on this issue.

"The Court: Well, at this point, the relevance for that contested hearing in terms of the overall outcome of the case would be what?

"[Father's counsel]: Just so that the court has an accurate record, a complete record, as to the information in the report. It's kind of—the report indicates that T[.B.], the child, is acting out verbally and physically and making comments, daddy hits mommy.

"My client insists that he's never had any domestic violence with his wife. His wife also confirms that they've never had any domestic violence. I'm unsure if perhaps T[.B.], the child, is confusing who mommy is in this case and might be recalling memories of maybe perhaps some domestic violence in the home in regards to his father and his older sister.

"I don't believe T[.B.]'s mother has ever been in the home with him, so I'm not sure where this information is coming from. And additionally, I don't believe that [Father]'s [new] wife has ever had any contact with T[.B.] that wasn't in a supervised

setting. So he would like the record to reflect that there's been no domestic violence between him and his wife.

"The Court: Again, what I'm trying to understand is what relevance would a finding in that nature have as it relates to any issues that need to be addressed in this case, noting that we are right now looking at long-term foster care as the plan [i]n this case.

"What would a finding one way or the other regarding domestic violence have on the issues as it relates to this young man?

"[Father's counsel]: It won't change the outcome of the hearing. It would still be long-term foster care. However, the father is desirous of having the child at some point returned to him and will file a [section] 388 motion. But if the court has in evidence information that is incorrect in prior hearings, that could be used against the father should he have a [section] 388 hearing and try to seek return of T[.B.] to his care with his wife in the home."

After hearing county counsel's argument that Father failed to make a sufficient offer of proof necessary to trigger a contested hearing under section 366.3, subdivision (f), the following discussion occurred:

"The Court: I want to make sure it's clear in my mind what the request is.

"The request, as I understand it, is for the court to set some type of contested hearing geared toward the court making—geared towards one thing and one thing only, and that would be the court making findings with regard to the apparent references to domestic violence contained in the reports.

"[Father's counsel]: Correct, Your Honor.

"The Court: Then with regard to the request to set a contested hearing for that type of finding, the court is going to deny that request. I am not by that denial making any decision one way or the other with regard to the references—the apparent references to domestic violence contained within the reports.

"[Father] should know that the court's not making any decision about that at all, not even thinking about it at all. And the reason that I would be denying it and, as I said, not making any decision at all in that regard is because factual findings in that regard at this point do not seem to be ripe or relevant for determination.

"If a request was placed before this court for some orders regarding the disposition of the case—lower case d, by the way—as it relates to [Father], the father's relationship to the child in the case by way of a [section] 388 petition, then if in the context of that petition a finding regarding references to domestic violence is necessary or relevant because of that petition, we'll cross that bridge when we come to it. We just haven't come to that bridge yet. I'll deny the request in that regard.

"Anything else?

"[Father's counsel]: I just thought of another thing in the report that the father had mentioned to me.

"I would hope the court would apply what it just recited to me to this other fact that was reported in the court report that [Father] might have acted inappropriately by placing his hand on T[.B.]'s behind. My client says that did not occur.

"The Court: All right. Again, if what you are suggesting is some request for a contested hearing for findings on that particular issue, again, the court's going to deny that request for the same reasons that I alluded to concerning domestic violence.

"Anything else?

"[Father's counsel]: No. Thank you, Your Honor.

"The Court: The court will find that notice was given to all parties in this matter as required by law in the case. The court has received, reviewed and will admit into evidence the September 8th, 2008, October 30, 2008, January 8th, 2009 reports from [SSA].

"The court's also going to order filed in the court file for completeness sake the letter of December 17th, 2008 from [Father] that I referred to earlier.

"The court will find by a preponderance of the evidence that continued supervision is necessary, authorize [SSA] to draw, bill and accept funds for the care, support and maintenance for the child, for special expenditures to allow the minor unlimited travel within the contiguous United States and to allow caretakers to sign medical consents on child's behalf during such travel.

"Find pursuant to section 366.3 that the services provided to the child are adequate and that there has been substantial compliance with . . . the permanent plan and with the case plan. Approve the case plan pursuant to the report of September 8th, 2008. Approve visitation pursuant to the report of September 8th, 2008. Adopt the recommendations of [SSA] in the September 8th, 2008 report."

The court continued the matter for another review hearing in July 2009. Father appealed, challenging the findings and orders of January 8, 2009.

DISCUSSION

I.

THE JUVENILE COURT DID NOT ERR BY DENYING FATHER'S REQUEST FOR A CONTESTED HEARING UNDER SECTION 366.3.

Father argues the juvenile court violated his constitutional right to due process by denying his request for a contested hearing under section 366.3. For the reasons we explain *post*, we disagree.

Postpermanency plan review hearings are governed by section 366.3. Section 366.3, subdivision (d) provides in pertinent part: "If the child is in a placement other than the home of a legal guardian and jurisdiction has not been dismissed, the status of the child shall be reviewed at least every six months. . . . The review of the status of a child for whom the court has not ordered parental rights terminated and who has not been ordered placed for adoption may be conducted by the court or an appropriate local agency."

Under section 366.3., subdivision (f), the parent carries the burden of proof of showing that further efforts at reunification are the best alternative to overcome the presumption that continued care is in the child's best interest. Section 366.3, subdivision (f) provides: "Unless their parental rights have been permanently terminated, the parent or parents of the child are entitled to receive notice of, and participate in, those hearings. It shall be presumed that continued care is in the best interests of the child, unless the parent or parents prove, by a preponderance of the evidence, that further efforts at reunification are the best alternative for the child. In those cases, the court may order that further reunification services to return the child to a safe home environment be provided to the parent or parents up to a period of six months, and family maintenance services, as needed for an additional six months in order to return the child to a safe home environment."

Father argues, "[h]earings under section 366.3 to review the permanent plan of long-term foster care may and should be evidentiary and contested where necessary to hear the facts of a case." In *Maricela C. v. Superior Court* (1998) 66 Cal.App.4th 1138, 1146 (*Maricela C.*), the mother argued that section 366.3, subdivision (f) "must be construed to mean that she is entitled to a contested hearing" and to construe it otherwise "would be unreasonable since it would deny her due process." The appellate court rejected the mother's argument. (*Maricela C., supra,* at p. 1147.)

The appellate court in *Maricela C., supra,* 66 Cal.App.4th at pages 1146-1147, stated: "While a parent in a juvenile dependency proceeding has a due process right to a meaningful hearing with the opportunity to present evidence [citation], parents in dependency proceedings 'are not entitled to full confrontation and cross-examination.' [Citation.] Due process requires a balance. [Citation.] The state's strong interest in prompt and efficient trials permits the nonarbitrary exclusion of evidence [citation], such as when the presentation of the evidence will 'necessitate undue consumption of time.' [Citation.] The due process right to present evidence is limited to

relevant evidence of significant probative value to the issue before the court. [Citations.]" In *Sheri T. v. Superior Court* (2008) 166 Cal.App.4th 334, 341, a panel of this court stated: "'Due process is a flexible concept which depends upon the circumstances and a balancing of various factors. [Citation.] The due process right to present evidence is limited to relevant evidence of significant probative value to the issue before the court. [Citations.] Even where cross-examination is involved, the trial court may properly request an offer of proof if an entire line of cross-examination appears to the court to be irrelevant to the issue before the court. [Citations.]'"

The appellate court in *Maricela C., supra,* 66 Cal.App.4th at page 1147, further stated: "The language at issue here requires a juvenile court to 'consider' all permanency planning options, including whether the child should be returned to the home of the parent. [Citation.] The word 'consider' means 'to think about carefully,' to 'take into account,' and 'to think about in order to arrive at a judgment or decision.' [Citation.] We do not believe that a court is required to hold a contested hearing in order to understand and make a decision about whether to return a child to its parent. Moreover, nothing in section 366.3[, subdivision](f) requires a juvenile court to hold such a hearing. We conclude that in order to meet the requirement set forth in section 366.3[, subdivision](f)[,] the juvenile court is required to accept an offer of proof from the parent seeking return of his or her child. The court is then required to focus its attention on the evidence presented, and to consider whether the parent's representations are sufficient to warrant a hearing involving full confrontation and cross-examination." (See *In re Thomas R.* (2006) 145 Cal.App.4th 726, 732 [juvenile courts may require an offer of proof from a parent when he or she has the burden of proof at the hearing in question].) Noting that "[a] statute should be interpreted to produce a result that is workable and reasonable" (*Maricela, supra,* at p. 1146), the appellate court in *Maricela C.* concluded its interpretation of section 366.3, subdivision (f) "produces a result that is workable and reasonable" (*Maricela, supra,* at p. 1147).

Father cites *In re Kelly D.* (2000) 82 Cal.App.4th 433 (*Kelly D.*), *In re James Q.* (2000) 81 Cal.App.4th 255, and *Ingrid E. v. Superior Court* (1999) 75 Cal.App.4th 751 in support of his argument he was entitled to a contested hearing upon his request and without regard to his making any offer of proof. The appellate court in *Kelly D.* held that "to 'participate' in the hearing connotes involvement as a party to the proceeding, one essential aspect of which is the reasonable expectation that parents could challenge departmental proposals and proposed court modifications." (*Kelly D.*, *supra*, 82 Cal.App.4th at p. 438.) The appellate court in *Kelly D.*, however, did not address what offer of proof, if any, a parent must make in order to obtain a contested hearing. We note that in a footnote, the *Kelly D.* court stated, "[i]n a recent opinion, this court . . . concluded the juvenile court may not deny a party the right to a contested review hearing, even if no offer of proof was tendered. (*In re James Q.*[, *supra*,] 81 Cal.App.4th 255 . . . .)" (*Id.* at p. 439, fn. 4.) But in *In re James Q.*, the issue was whether the parent was entitled to a contested hearing at a six-month prepermanency review hearing under section 366.21, not a postpermanency plan review hearing under section 366.3. (*In re James Q.*, *supra*, 81 Cal.App.4th at p. 258.) In *Ingrid E. v. Superior Court*, *supra*, 75 Cal.App.4th at page 755, the issue was whether the juvenile court erroneously denied the parent a contested hearing before scheduling a permanency hearing under section 366.26. This is significant because "'[u]p until the time the [permanency] hearing is set, the parent's interest in reunification is given precedence over the child's need for stability and permanency.' [Citation.] However, '[o]nce reunification services are ordered terminated, the focus shifts to the needs of the child for permanency and stability.' [Citation.]" (*David B. v. Superior Court* (2006) 140 Cal.App.4th 772, 778.) Although reunification remains possible in the postpermanency context, as discussed *ante*, it is presumed that continued care is in the child's best interests unless the parent can prove otherwise. (§ 366.3, subds. (e), (f).)

We agree with the appellate court in *Maricela C.* that in determining whether there should be a contested postpermanency plan review hearing under section 366.3, subdivision (d), the parent must allege facts showing that removing the child from his or her current placement and returning him or her to the parent's care would serve the child's best interest. (See *Maricela C., supra,* 66 Cal.App.4th at p. 1147.) Does the record show Father made such an offer of proof? No.

Father's request for a contested hearing was based on two concerns: (1) T.B.'s reference to "'daddy hitting mamma'" might be falsely interpreted as referring to domestic violence between Father and his current wife; and (2) the social worker's report falsely suggested Father inappropriately touched T.B.'s buttocks. The juvenile court explained to Father's counsel that the court would not make any findings of fact at the postpermanency plan review hearing as to issues of any domestic violence or inappropriate touching because they were not relevant to the court's determination whether T.B's current placement was serving his best interests. Notwithstanding the status review reports' references to Father's desire to have T.B. placed in Idaho, Father did not argue to the juvenile court at the postpermanency plan review hearing, and does not argue on appeal, that the juvenile court should have returned T.B. to Father's care. Instead, Father argues that the references in SSA's reports to possible domestic violence and inappropriate touching of T.B. might come back to haunt him should he file a section 388 petition seeking T.B.'s return to his care. The court, however, expressly assured Father's counsel that it was not considering those references in the social worker's reports as they were not ripe or relevant for determination. The court further stated that should Father file a section 388 petition, making findings on such matters necessary, "we'll cross that bridge when we come to it. We just haven't come to that bridge yet."

Pursuant to section 366.3, subdivision (f), Father had to carry the burden of overcoming the presumption that continued care was in T.B.'s best interest by proving, by a preponderance of the evidence, that further efforts at reunification were in T.B.'s

best interest. Father did not make any offer of proof in that regard by way of his letter or through his counsel's representation at the hearing. The court, therefore, did not err by denying a contested hearing.

Father argues for the first time on appeal that the juvenile court should have granted his request for a contested hearing because "[SSA] failed to investigate and report on the following issues: the pending majority of the minor, the bonded and loving relationship between the minor and the father, the change in the circumstances of the father by reason of his avid participation in services and therapy long after reunification services were terminated in this case and by reason of his marriage, and whether a second reunification period should be offered the family. [SSA] failed to investigate and report, and the juvenile court failed to hear the issues to be visited at a review hearing as described in section 366.3[, subdivision](d) . . . . A review hearing was thus denied this family, both the father and the minor."

Section 366.3, subdivision (e) sets forth a list of factors the juvenile court must consider at a postpermanency plan review hearing, including the continuing necessity for and appropriateness of the child's current placement, the continuing appropriateness of compliance with the child's permanent plan, and the adequacy of services provided to the child. But, as discussed *ante*, whether a postpermanency plan review hearing should be conducted as a contested hearing in the first place depends on whether a parent has made an offer of proof showing he or she can overcome the presumption that continued care is in the best interests of the child. (§ 366.3, subd. (f).) Father does not argue he has ever made an offer of proof that reunification would be in T.B.'s best interest as required by section 366.3, subdivision (f) to trigger a contested hearing. The juvenile court therefore did not err.

II.

SUBSTANTIAL EVIDENCE SUPPORTED THE JUVENILE COURT'S FINDING THAT ADEQUATE SERVICES HAVE BEEN PROVIDED TO T.B.

Father also argues the juvenile court erroneously found that T.B.'s services had been adequate, stating: "[SSA] failed to investigate and report on the following issues: the pending majority of the minor, the bonded and loving relationship between the minor and the father, the change in the circumstances of the father by reason of his avid participation in services and therapy long after reunification services were terminated in this case and by reason of his marriage. [SSA] had also failed to effect a placement of the minor proximate to the father. Thus, it was error to find that services by [SSA] had been adequate at the January 8, 2009, hearing."

But the status review reports, admitted into evidence and considered by the juvenile court at the January 2009 hearing, addressed T.B.'s special needs, his successful and appropriate placement at the South Coast Children's Society regional center group home, SSA's unsuccessful efforts to find an appropriate and available group home placement for T.B. in Idaho near Father, SSA's exploration of R.B.'s interest in having T.B. eventually placed with her, and Father's ongoing communication with T.B. Father did not attend the postpermanency plan review hearing and did not produce evidence of his "bonded and loving relationship" with T.B. or any change of circumstances created by "his avid participation in services and therapy long after reunification services were terminated in this case and by reason of his marriage."

SSA's October 30, 2008 addendum report stated T.B. "appears to be happy and all of his physical, emotional, medical, and educational needs are being met in his current placement." Substantial evidence supported the juvenile court's finding at the January 2009 postpermanency plan review hearing that adequate services had been provided to T.B.

DISPOSITION

The order is affirmed.

FYBEL, J.

WE CONCUR:

SILLS, P. J.

RYLAARSDAM, J.